IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

ADELAIDE M. HARDING,
Plaintiff in Error,
vs.
GEORGE F. HARDING,
Defendant in Error.

Error to Supreme Court of California.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

Statement and Synopsis of Essential Facts, Questions Raised and Points Argued.

Statement and synopsis of essential facts, questions raised and points argued.

I.

Complaint.

The complaint (Trans., 1), filed August 31, 1897, contains three allegations, touching, respectively:

(1) The marriage of the parties in 1855.

(2) The residence of the husband in California, in San Diego County, since May 15, 1895.

(3) The willful desertion of the wife without just cause, in or about and ever since February, 1890. The complaint prays for a decree of divorce.

II.

Answer.

The answer of Adelaide M. Harding:

(1) Admits the allegation of the complaint touching marriage.

(2) Denies the allegation touching residence.

(3) Denies the allegations touching desertion. (Trans., 2-3.)

(4) Sets up orders and decree of the Circuit Court of Cook County, Illinois, in her maintenance suit (*Id.*, 3-19), and stipulation filed therein by the husband on January 3, 1893 (*Id.*, 8), and pleads the same as "a bar to the complaint" (*Id.*, 18), *alleging that "said proceedings and decree," "from and after the filing of said statement,"* "on the 3d day of January, 1893," "*proceeded* upon said statement," *"and the said court,* * * * in entering the said decree, *proceeded upon the said statement* * * * in finding and adjudging in said decree * * * that this defendant was, * * * on the 3d day of February, 1890, and ever since had been, and then still was, living separate and apart from the said George F. Harding, without her fault." (*Id.*, 18.)

The *stipulation* thus confessed to be the basis on which the decree proceeded, "and *the court proceeded,"* is set forth and shown under Points IX and X *post,* to make said decree a "consent decree" only, and not an *adjudication;* hence not a bar or estoppel, even had the issues in the two cases been identical; and not being an adjudication, *no federal question arises, and this court has no jurisdiction of this cause.*

Supplemental Answer filed January 4, 1901.
(Trans., 19-20.)

Adopts prior answer (Trans., 19), thereby repleading *decree per stipulation of January* 3, 1893, as a bar; *alleging payment of large sums of money by* George F. Harding to said Adelaide M. Harding, *in pursuance of and as directed by the said* decree. (Trans., 22.)

Also sets up same decree as modified by decree entered December 8, 1899, reducing alimony allowances, and pleads said decree, so modified, as a bar and estoppel. (Trans., 22.)

The said modified decree of December 8, 1899, so pleaded as a bar, distinctly provides that said prior decree of July 26, 1897, so far as not inconsistent therewith, and as so modified, stands in full force, thus clearly manifesting that the said decree, as well after as before its said modification, was a *decree per stipulation of January* 3, 1893.

Said modified decree further provided (Trans., 21) that such alteration thereof, "in the allowance of alimony, may be made by future decree or decrees as shall or may be found to be just and reasonable," just as the prior decree of July 26, 1897 (Trans., 17), limited the payment of the allowances therein *"until the further order of the court,"* and provided (Trans., 18), "that either party be at liberty to apply to the court as circumstances may require," thus clearly manifesting *that neither said decree nor said decree as so modified was a* **final** decree, if any decree in a separate maintenance suit ever is final in the sense of being irrevocable and putting an end to the suit itself.

That said decree and said decree as modified was not

in said sense final, irrevocable and immutable, but that the allowances thereby made were subject to alteration, reduction and even extinguishment, is established by an overwhelming weight of authority.

Audubon v. *Shufeldt,* 181 U. S., 575.
Welty v. *Welty,* 195 Ill., 345.
Cutler v. *Cutler,* 88 Ill. App., 464.

This raises a serious question as to whether any decree so alterable, revocable, interlocutory or non-final in its nature can be in any case successfully pleaded as a bar or estoppel.

How can any other court know, when called upon to sustain such a decree as a bar or estoppel, whether such decree is not at that very time being annulled, or has not already been, or will not the next day or hour be annulled by the court which entered it?

The same authorities last above cited uphold the *exclusive* jurisdiction of the court decreeing maintenance allowances to vacate or alter them.

This doctrine may have been and probably was in the mind of the learned Chancellor in California when, in his second conclusion of law (Trans., 24), he held "that *this* court, in *this* case, has no jurisdiction to limit or in any way affect the decree of the Circuit Court of Cook County, Illinois," thus leaving *that* court in *that* case to limit, change or revoke its own decree in view of any facts brought to its attention calling for such change or revocation, such, for instance, as misconduct of the wife, *divorce* for desertion, or other cause, subject only to the decision of higher courts on appeal, by either party, from the order granting or refusing such change or revocation.

The question what effect the divorce decree would or

should have on the separate maintenance decree, and whether the latter should stand or fall, in whole or part, was primarily a question for the court entering said maintenance decree, and afterwards, on appeal therefrom, for the courts to which such appeal or appeals might go.

It was not a question for the California court, and was declined by the language of its second conclusion of law.

The modified decree of December 8, 1899, *has never,* since its entry by the Circuit Court, *been before the Supreme Court of Illinois,* hence the latter court has never passed, one way or the other, on the question of whether *that* decree was or was not a consent decree, "proceeding" and based upon the stipulation of January 3, 1893, as it was clearly held to be by the Circuit Court's own prior order of reference (Trans., 79), by its certificate of evidence (Trans., 91), and by its refusal and non-insertion in its prior decree (Trans., 16) of the requested finding that the allegations of the bill of complaint were true.

In deciding that the decree of July 26, 1897, as modified by the decree of December 8, 1899, was a "consent decree," the Supreme Court of California decided only what the Circuit Court in Illinois had evidently decided.

III.

Stipulations, in California divorce suit, whereby each party consents that the other party may read in evidence in said suit any testimony of witnesses in Illinois maintenance suit contained in printed abstract of record thereof. (Trans., 37.)

It is contended that by these stipulations, and by the testimony read under them by both parties, without objection, from the abstract of the Illinois record, the supposed estoppel, if any, of Illinois maintenance decree was waived, and the issues in the divorce suit were by mutual consent thrown open for trial, and actually tried upon their merits, and decree for divorce entered and affirmed upon the mere weight of the evidence without reference to any federal question. Hence this court has no jurisdiction of this cause.

IV.

Testimony in maintenance suit read by both parties, without objection, at the hearing of divorce suit, pursuant to above stipulations. (Trans., 38-9, 86-90 and 93.) The said estoppel, if any, was thereby waived and federal question eliminated, depriving this court of jurisdiction of this suit.

V.

Oral testimony introduced by both parties, without objection, at hearing of divorce suit on issues therein, including domicile, willful desertion, etc. Introduction of said oral testimony by consent and without objection operated as a waiver of the supposed estoppel, and led to a trial upon the merits.

See George F. Harding's oral testimony (Trans., 26-34; also 39-43 and 93-95). Other oral testimony at said hearing (*Id.*, 25-26; 34-36). Also Victor M. Harding's oral testimony, as witness for defendant (*Id.*, 90-91).

VI.

Findings of facts.

The court found:

(1) That parties were married in 1855, as stated in complaint, and "cohabited as husband and wife until about the 1st of February, 1890." (*Id.*, 22-23.)

(2) That the husband was and had been since May 15, 1895, a *bona fide* resident of San Diego County, California, as stated in complaint. (*Id.*, 23.)

(3) That the wife willfully deserted her husband on or about February 1, 1890, without just cause, and ever since has so continued willfully and without just cause. (*Id.*, 23.)

(4) *That all allegations in the complaint are true,* and that all the allegations, averments and denials in conflict with the allegations in complaint, contained in answer and supplemental answer of defendant, are untrue. (*Id.*, 23.)

(5) "That the Circuit Court of Cook County, Illinois, a court of competent jurisdiction, in a proceeding for separate maintenance by defendant against plaintiff, has entered decrees for allowances of alimony against plaintiff, which are allowances adjudged by the Supreme Court of Illinois to be equal to the present ability of the estate of the husband, with rights reserved to wife to increase the same when faculties of the husband may be decreed to warrant such increase." (*Id.*, 23.)

These findings "included *all the finding of all the probative facts* necessary to the finding of the *ultimate* facts. *Adams* v. *Crawford*, 116 Cal., 495.

VII.

Conclusions of law.

The court finds:

(1) That plaintiff is entitled to a decree of divorce. (*Id.*, 23.)

(2) That this court in this case has no jurisdiction to limit or in any way affect the Illinois decree adjudging a separate maintenance to defendant. (*Id.*, 24.)

VIII.

Decree of divorce.

Recites and finds that it "appears" from the said findings of facts and conclusions of law "that all the material allegations of the complaint are sustained by the testimony" (*Id.*, 24), "wherefore" the court decrees *dissolution of the marriage* (*Id.*, 24).

This demonstrates that the court regarded its two conclusions of law as perfectly compatible with each other and with the absolute divorce decreed.

The *second* conclusion of law was entirely needless except, perhaps, as an explicit precautionary disclaimer that by the decree entered the court did intentionally, or in fact, or in effect, deny to the maintenance decree any faith, credit and effect to which it was entitled. As to

what faith, credit and effect it was or might be entitled to, no conclusion was announced; but whatever the same might be, the court disavowed all jurisdiction to limit or affect it, leaving the consequences of the two decrees to take care of themselves under and according to settled legal principles, and the law of the land.

IX.

Opinion of Supreme Court of California affirming decree of divorce. (Trans., 107-111.)

Holds, inter alia:

(1) That the lower court's determination as to the *bona fides* of complainant's residence in California was a "determination of a question of fact upon conflicting evidence," which, under California practice and decisions cited, "*here cannot be disturbed.*"

(2) And that "the same rule must also be applied to the question of the sufficiency of the evidence" (as to desertion).

"It was in sharp conflict, and upon either side was the corroborating evidence of the children. * * * The determination of the trial court under these circumstances, that the defendant had been guilty of desertion, cannot here be disturbed." (Transcript, 108.)

(3) That the question of defendant's alleged desertion was still open to inquiry, and was not foreclosed by the maintenance decree of the Illinois court, and that said decree did not operate as an *estoppel.*

(4) That the separate maintenance decree was entered "*by consent* and as the *result of a compromise.*"

That the court, in entering it, did not, after argument and consideration, come to a decision on a *contested matter;* and exercised no judicial function upon the subject, but merely an administrative function by *recording what had been agreed to by the parties.*

That consequently the decree could not be considered as a *judicum,* nor as *res judicata.*

That from and after January 3, 1893, when Mr. Harding's stipulation was filed in the maintenance suit, *the issue as to whether his wife was living apart without fault on her part, was entirely eliminated* from the case and *there was to be no finding or trial of such an issue;* hence no *adjudication.* (Trans., 110.)

(5) That in his said stipulation the husband alleged his ability to make good his defense, if the case must be tried, and "asserted that it seemed to be in the interest of peace, and *to end the litigation, to consent to a decree* for such sum as the court might find to be equitable," and that she (Mrs. Harding) "may *take a decree with my consent* for such sum," etc. (Trans., 109.)

(6) That in pursuance of this stipulation the court made its order of reference to the master, quoting said order as set forth in transcript (page 79) as follows: "To take evidence and report the same, with his conclusions upon the issue in question *as to the amount or amounts,* if any, to be allowed complainant and to be decreed to be paid by the defendant to complainant for alimony and upon other issues herein *than the question as to whether complainant, at the time of the commencement of this action, was, and since that time has been, and is, living separate and apart from her husband, the defendant, without her fault;* said defendant having admitted upon the record herein as by his written stipulation filed herein on

January 3, 1893, and *for the purpose of this trial only,* that the complainant was at the time of the commencement of this suit and since that time has been and is living separate and apart from her said husband without her fault." (Trans., 109.)

N. B.—This order was an *adjudication* by the court, that *the stipulation* so filed on January 3, 1893, was *made, accepted, and acted upon by the parties and the court* upon the express understanding that it was not thereby stipulated for the purpose of any other suit or even for the purpose of any other trial of that suit than *"this trial only,"* that the wife was or had been living apart from her husband without her fault.

It was furthermore an *adjudication* and *direction* or *command* to the master *that no evidence was to be taken or reported* by him with or without conclusions *as to whether she was so living apart without her fault;* but that evidence should be taken and reported by the master with his conclusions upon the question of the amount of alimony to be allowed.

This excludes all possible inferences that testimony taken and reported on *"other"* issues, such as *custody* and *maintenance* of children (Decree, Trans., 15), was testimony reported or considered by the master or the court on the question of such living apart.

(7) The opinion *holds* that the *litigation* which followed "attended *the fixing of the amount.*" (Trans., 109.)

(8) That the filing of a *"certificate of evidence"* was *provided for by the decree* entered July 26, 1897. (See Trans., 83.) That said "certificate of evidence," *signed and sealed* by the judge entering the decree, was *filed,* and thereby, by its terms and those of the decree itself,

was made a *part of the record* in said cause (Trans., page 92), and (as held in *Ensminger* v. *Powers,* 108 U. S., 292, and *Rawson* v. *Rawson,* 37 Ill. App., 495, cited in the opinion), *"must have the same effect as if* the narration it contains of what occurred were *incorporated in the body of the decree."*

The opinion quotes from said certificate of evidence the following, which appears in transcript (page 91):

> "In settling the terms of said decree, the attorney for the complainant requested the court to find in such decree that the allegations in the said bill of complaint as amended herein are true; but the defendant objected to such finding on the ground of the paper filed herein on January 3, 1893, and presented to the court by the defendant, and the contents thereof, and on the further ground that such finding was not warranted by the proof; and **the court stated that it, the court, had not considered and passed upon that question** *for it, the court, regarded it as unnecessary in view of the said paper of defendant, filed herein January 3, 1893;* and **thereupon such finding was not inserted in such decree."**

(9) That no more force is to be allowed to the judgment of a sister state, when raised as a bar by way of estoppel in an action between the parties in another state, than would be accorded to that judgment by the courts of the state which rendered it.

(10) That "by the *rule of decision* in the courts of *Illinois* a *consent judgment* operates to estop the parties *no further than is necessary to secure the enforcement of the judgment or decree in the particular matter in which the consent judgment was given,* and it *is not a bar to any inquiry into the same question* in any other action," cit-*Wadhams* v. *Gay,* 73 Ill., 417, and other cases. (Trans., 110.)

X.

Stipulation filed January 3, 1893, in maintenance suit.

This appears in proof (Trans., 72), and also on page 8, where it is embodied in the wife's answer to the husband's complaint for divorce, and on the next page *is pleaded by her as a bar* to said complaint.

While for the purpose of fortifying the opinion of the Supreme Court of California as to the character and effect of said stipulation, we invite attention to it as a whole, we need only here quote and emphasize the following passages thereof:

"* * * *Whatever the result of this case, it would be my duty, as I understand it, to give her further support; and this I should do, whatever the result of this case, and without reference to whether she can exact it or not.*"

"*I am confident of making good my defense if the case must be tried.*"

"Hence it seems to me to be wise in the interest of my family and of peace, if I can *put an end to this litigation* to do so *by consenting to a decree* giving her for separate maintenance such a sum as the court may find to be just and equitable," etc.

"*Hence I give* **my consent that a decree for separate maintenance shall be entered** in favor of the plaintiff, **without a finding or trial of issue in this case.**"

"I further offer and stand ready to make such other or further or different stipulation * * * as may, in the opinion of your Honor, be required to make it **unnecessary** *for the court* **to hear and decide** *upon the issues and evidence in this case,*" etc.

"I do hereby *stipulate that* the *plaintiff* * * * *may take a decree with my consent* for such sum," etc.

It would seem clear enough from the very contents of such a stipulation that it could not, nor could any decree based on it, operate as an estoppel.

As held in 39 La. Ann'l, 443, in the case entitled "Succession of Harris":

> "A party is not stopped by judicial declaration made for the purpose of simplifying proceedings and for the common interest and convenience of all parties concerned and which have neither misled nor damaged any one."

It has already been sufficiently shown that Mrs. Harding was neither misled nor damaged by the stipulation upon which her decree "proceeded," giving her $6,400 per annum for a long series of years, and she admitted in her answer in California (Trans., 22) that she had received from her husband *large sums of money* "in pursuance of and as directed by the said decree."

Applying to this case the doctrine and substantially the very language of this court in *Gay* v. *Parpart*, 106 U. S., 679: "It is impossible to see how the doctrine of estoppel can operate in favor of" plaintiff in error.

The above case in 39 La. Ann'l, 443, quotes with approval the following from Greenleaf on Evidence, Section 204:

> "It is, in such cases, material to consider whether the admission is made independently, and *because it is true*, or is *merely conventional, entered into* between the parties *from other causes than a conviction of its truth*, and only as a convenient assumption *for the particular purpose in hand.*"

XI.

The master's report, made in strict obedience to the order of reference (Trans., 79), reported the testimony and his conclusions as to amount of alimony only, and no testimony or conclusions upon the question of the wife's living apart from her husband without her fault.

This appears from said report as set forth in her answer to the divorce complaint. (Trans., 15.)

Hence, when the case came before the court upon said master's report and exceptions of both sides thereto—which were overruled—the finding of the court in the decree (Trans., 16) "that the complainant was and had been living apart from her husband without her fault," was manifestly not a finding upon evidence, but upon the basis of the stipulation of January 3, 1893, as recited in the certificate of evidence (Trans., 91), and as claimed, indeed, by the defendant herself in the next to the last paragraph of her said answer. (Trans., 18.)

It is further apparent from said decree (Trans., 16) that the additional evidence which the court heard related to the reported amount of alimony, from which in consequence of such additional evidence, the court made the reduction mentioned on said page 16.

To suppose that the court did not make the stipulation of January 3, 1893, the basis of the finding of its decree that the wife was and had been living separate and apart from her husband without her fault, is to suppose that the court made such finding, not only upon no evidence whatever, but after the giving and taking of evidence on that subject before the master had been ex-

plicitly forbidden by the court's own order of reference. (Trans., 79.)

Such a supposition would not merely make the court do violence to its said order, and to the stipulation thereby recognized, but would amount to an accusation that the court had condemned the defendant without a hearing, "contrary to the first principles of the social compact and of the right administration of justice." (*McVeigh* v. *U. S.*, 11 Wall., 267.)

"*A sentence of a court pronounced against a party without hearing him*, or giving him an opportunity to be heard, *is* **not a judicial determination** *of his rights*, **and is not entitled to respect in any other tribunal.**"

Windsor v. *McVeigh*, 93 U. S., 274.

XII.

The decree, and the only one, pleaded by the defendant, Mrs. Harding, as an estoppel, is the one copied in quotation marks and set forth and sworn to as correct in her sworn answer on pages 15 to 19 of the transcript.

That decree does not contain the recital or finding that the allegations of the bill of complaint as amended are true, which finding, as already shown by the certificate of evidence (Trans., 91-92) was not inserted in said decree notwithstanding Mrs. Harding's counsel had requested that it should be.

The finding "that the equities of this cause are with the complainant"— contained, as it is, in a decree shown and pleaded as one entered, not upon evidence, but by

stipulation—simply signified that the decree followed the stipulation and accorded to her as her equity under it the separate maintenance which rested upon the stipulation as its only basis.

Furthermore, the answer of Mrs. Harding to the divorce complaint (Trans.. 14) urges the claim that *the order of reference* to the master (Trans., 79) *was entered upon the said stipulation of January* 3, 1893. She calls it a "statement" and "admission," but, by the *nunc pro tunc order* of April 15, 1893, entered as of May 15, 1893, long before the decree of July 26, 1893, the words *"and now admitting in open court"* were stricken out, and the following words substituted: "as by his written stipulation filed herein on January 3, 1893, and for the purpose of this trial only." (Trans., 15, also 79.)

There was no occasion for the decree of July 26, 1897, to recite that its finding of complainant's living apart without her fault was based solely upon said stipulation of January 3, 1893, as that fact was already *adjudicated* by the court's said prior order of reference, and a repetition of such adjudication was needless. The certificate of evidence, read as part of the decree, explicitly recites that no evidence upon the question was considered or passed upon, because of the said stipulation.

XII.

NO ESTOPPEL.

For reasons which follow, neither the decree, the modified decree, nor the stipulation, nor all combined, created a bar or estoppel against the prosecution of the California divorce suit, nor against proving therein the truth of the charge of willful desertion, nor against proving any fact whatever essential or material to the establishment of said charge.

(1) The maintenance decree, with parts thereof pleaded and relied on as a bar, viz., *the supposed findings* and judgment therein, that the wife was living apart from her husband without her fault, was not an *adjudication* or *res adjudicata* upon a *contested matter,* but *was the result of a compromise* and was *entered by consent* and based exclusively on the stipulation of January 3, 1893.

(2) Said stipulation insisted that plaintiff's charges were not true and as confidently insisted on the merits of husband's defense and his ability to make it good. Consequently, the stipulation to the effect that she was living apart without her fault is to be treated only *as conventional,* not as a statement made because it was true, or from any conviction of its truth, but only as a convenient assumption for the purpose in hand, the ending of litigation and adjustment of family differences; hence neither the stipulation nor decree based on it can be held as an estoppel.

Greenleaf, Ev., Sec. 204.

39 La. Ann., 443, Succession of Harris.

(3) Said stipulation was *not given as an admission to be used in place of evidence* upon the trial of an issue remaining for trial, but *to put an end to the litigation by putting* **that issue out of the case entirely** by allowing the plaintiff *to take a decree* **by consent, without a finding or trial,** and in order **"to make it unnecessary** for the court **to hear and decide upon the issues and evidence."**

(4) The decree, based on such stipulation, cannot operate as an estoppel, because if not entered solely under and according to said stipulation it was entered **upon an issue no longer in the case, without trial, without evidence, all evidence being prohibited and excluded by the order of reference, and none considered and passed upon by the Master or the court.**

The *decree,* if so entered, was *not a judicial determination,* but absolutely *void,* and not *entitled to respect in any other tribunal,* as an estoppel or otherwise.

Windsor v. *McVeigh,* 93 U. S., 274.

(5) Plaintiff in error *is estopped from pleading estoppel* as against the stipulation and stipulated decree thereon, for the reason that *she cannot repudiate the terms of said stipulation after receiving the great advantages and large sums of money which she received solely by the terms and provisions thereof.*

(6) The defense of *estoppel* is not available to plaintiff in error against the decree by stipulation under which she took vast advantages and suffered no disadvantage whatever.

Gay v. *Parport,* 106 U. S., 679.

(7) Estoppel is unavailable to her, because she went into a trial of the divorce case on its merits and stipulated

(Trans., 37) for the introduction of evidence by both parties, both of whom introduced evidence *accordingly* on the issues of willful desertion, domicile and other matters alleged, in the complaint and denied in the answer.

(8) The maintenance decree cannot be relied on as an estoppel because it is not, in its nature, final, absolute and unalterable, but is subject at any time to be changed, reduced, revoked and extinguished by the court having jurisdiction of the cause in which the same was entered. Not only is this power of alteration and revocation expressly reserved in the decree itself, but independently of that, by reason of the nature of such decrees and causes, the same power of alteration and revocation inheres in the court according to the general current of authority.

Audubon v. *Shufeldt*, 181 U. S., 575.
Welty v. *Welty*, 191 Ill., 340.
Cutler v. *Cutler*, 88 Ill. App., 464.

Therefore the answer of Mrs. Harding, wherein she pleads said maintenance decree in bar of this suit, setting up that said decree is "unimpeachable and irreversible at the suit or on the contention of said George F. Harding" (Trans., 19), is incorrect.

(9) **The issues in the two cases were not identical; hence there was no estoppel.**

"Willful desertion" under the Civil Code of California, Section 92, is ground for a divorce.

Section 95 defines "willful desertion" to be "the voluntary separation of one of the married parties from the other with intent to desert," and Section 100 provides that "absence or separation proper in itself becomes desertion whenever the intent to desert is fixed during such absence or separation."

The issue raised by the pleadings in the divorce suit in the trial court was simply and solely whether Mrs. Harding was guilty or not guilty of "willful desertion" within the meaning of said sections of the said Civil Code.

The issue in the Illinois separate maintenance suit, which *might have been litigated and judicially determined* therein, *but was not,* because distinctly eliminated as an issue, was whether, within the meaning of the Illinois statute, Mrs. Harding was living apart from her husband without her fault.

That there is no identity between the question at issue in the divorce suit and the issue, even had it not been eliminated, in the maintenance suit, seems almost too self-evident to require discussion or citation of authorities.

As held in *Wahle* v. *Wahle,* 71 Ill., 513, with reference to a bill for divorce for desertion, and a bill for separate maintenance:

> "It cannot be pretended that the object of the bills and the relief sought is, in each case, the same. Nor will the same evidence necessarily determine both cases."

The court then proceeded to state the difference in the proof required in the cases respectively, and clearly demonstrated that the issues were not the same in the two suits.

This conclusion was followed and approved in the case of *Umlauf* v. *Umlauf,* 117 Ill., 584, where the court says:

> "The question then recurs, is the proposition that Mrs. Umlauf lived separate from her husband 'without her fault' identical with the proposition that 'she willfully deserted and absented herself from him without any reasonable cause'? We are of the opinion *they differ in several essential particulars.* The element of *willfulness* contained in the latter proposition is clearly not to be found in the former. Nor

> do we regard the two expressions, 'without fault' and 'without reasonable cause' either in a popular or legal sense as equivalent terms."

On page 585 the court, referring to the decree against the wife in her separate maintenance suit, said:

> "The only question it conclusively settles is, that her living apart from her husband was not without her fault."

In the *Umlauf* case the husband relied on the supposed estoppel; in the *Wahle* case it was invoked by the wife. That was held, in the *Umlauf* case (117 Ill., page 587), to be the only difference between them. The estoppels were *defeated in both cases and for the same reason,* viz., that the *issues* in the divorce suit and in the separate maintenance suit were *not identical;* that it was "not sufficient that the question arising in subsequent litigations is identical with the one decided in *some* respects only; it must be so in *all* respects. If, therefore, there is an element in one of the questions, which is not contained in the other, the rule (of estoppel) does not apply, for the obvious reason that this additional element may have been the turning point in the previous decision."

See page 584 of 117 Ill., *supra.*

In the *Wahle* case, *supra,* final decree on the merits after trial by jury was entered against the husband, dismissing his bill for divorce, charging his wife with "willful desertion." Upon the subsequent hearing of her bill for separate maintenance she urged (page 512 of 71 Ill.) that the verdict and decree against her husband on his bill for divorce was a judicial determination justifying her in living apart from her husband, as her answer admitted she had done for two years.

This contention was overruled on the plain ground

that *the issues* in the two cases *were different;* that so far as the question of the wife's living apart without her fault, which was the issue in the *second* suit, was drawn into the *first* suit for divorce for willful desertion, it came in *incidentally* and *collaterally* only. Hence the verdict against the husband and the decree thereon dismissing his bill *were not a judicial determination* that she was justified in living apart from him or entitled to the relief prayed by her bill for separate maintenance. The familiar principle of law governing the case was announced as follows:

> "A judgment or decree is not evidence upon a question which was only collaterally drawn in question, nor to any matter incidentally cognizable, or where it is to be inferred from the judgment only by argument or construction."
>
> Freeman on Judgments, Sec. 258.

REPLY, SERIATIM, TO POINTS IN BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

As the brief and argument of the learned counsel for the plaintiff in error has come to hand so short a time before the present brief is due as to preclude a more satisfactory method of replying to it, the writer will take up its statements and positions as nearly as may be *seriatim*, trusting that the deficiencies of this method may be to some extent supplied by the foregoing presentation of the case prepared with a view to anticipating the positions which opposing counsel were supposed likely to take.

With reference to what counsel say in their statements (p. 2) as to the holding of the California Supreme Court that the Illinois decree was a "consent decree," counsel certainly do not mean to impute to that court the holding that the decree *in its entirety* was a consent decree. They must mean only, as that court clearly meant, that the supposed finding and judgment in said decree that the wife was living apart from her husband without her fault, was so entered by consent pursuant to the stipulation hereinafter mentioned; not that the rest of the decree relating to the amount of alimony, custody and support of children, *et cetera*, was entered by consent. For neither the court nor the parties nor counsel on either side have ever held or claimed that the decree was by consent as to said *contested* matters.

Whenever and wherever, therefore, in the opinion of the Supreme Court of California, the expressions "entered into by consent," "judgment by consent" or "con-

sent judgment" are used, it is manifest that they all mean the same thing and are limited to the ostensible, but only ostensible, finding and judgment clauses referring to such living apart, and do not extend to any other judgment clauses which relate to the contested matters.

Whenever in this brief, likewise, the expression "consent decree" or "decree by consent" occurs, they must be understood in the same limited sense in which they were used in the opinion of the California Supreme Court.

Counsel, therefore, must agree with us that the following sentence of that court's opinion (Trans., 110) is restricted as above indicated, namely: "It thus appears from this case that the courts of Illinois will not allow the application of the doctrine of estoppel to a consent judgment which merely registers an agreement between the parties;" and the same may be said of the following sentence (p. 110): "That judgment having been entered into by consent would not, in the courts of Illinois, raise the bar of estoppel against the determination of the issue of desertion."

This last paragraph in the closing sentence of the opinion, narrowed down in its application to the judgment clause relating to "living apart," which was unquestionably put into the decree through the sole agency of the stipulation between the parties, and to which the court also became an acting and active party, presents the precise question under discussion, namely, whether such a judgment clause so entered into by consent would not, in Illinois, and therefore in California, *raise the bar* of estoppel against the determination of the issue of desertion.

If that part of the ostensible judgment clauses of the

decree relating to such living apart "proceeded," as in her answer (Trans., 10), pleading them as bar, she alleged they did proceed, upon the stipulation therein referred to, we are at a loss to know how counsel are going to fulfill their prediction that they will show that the California Supreme Court erroneously held the said stipulated finding and judgment clauses of the decree to be a consent decree, or, in equivalent terms, a decree by consent.

As to the statement (p. 2) with reference to California never having been the matrimonial domicile of the parties, we need only say at this time that it was conclusively held and decreed by both the California courts on the clear weight of the evidence that California was, and since May, 1895, down to the date of the decree of divorce, in 1901, had been the residence and domicile of the defendant in error; and that her matrimonial domicile ought to have been the same as his and would have been but for her willful desertion.

It is submitted that a wife in the wrong and convicted of it, cannot take advantage of her own wrong in refusing to make the husband's home the matrimonial domicile of both, and especially when, as the record shows (Trans., 41, 68), she persistently rejected at all times after leaving his home down to the date of the decree of divorce, his constant, repeated and standing invitations to return to him and make his home her own. The particulars as to these invitations and rejections are given elsewhere in this brief; and those rejections were facts legitimately tending to prove her desertion.

The next statement of counsel (p. 2) that prior to the commencement of the divorce suit the issue involved in the case had been tried in Illinois and adjudicated in fa-

vor of plaintiff in error, is a begging of all the vital questions now under discussion.

We deny that the issue in the divorce case, namely, willful desertion, which was the only issue, was tried in Illinois, or was an issue in the Illinois case, or was or could be adjudicated in either party's favor in said case. Not only so, but even the issue of her "living separate and apart without her fault" was put out of the case, and the trial of that was explicitly dispensed with by the stipulation of January 3, 1893.

The only prayers of the bill filed by her in Illinois were that it might be found that she was so living separate and apart from her husband without her fault and that the defendant be decreed to provide her with separate maintenance.

Had the issue of her so living apart remained in the case, instead of being put out of it by a stipulation, and had there been *a trial* of that issue, instead of a trial being dispensed with, and had there been a decree upon such issue and trial against her, the only question such decree would have conclusively settled would have been *"that her living apart from her husband was not without her fault."*

Umlauf v. *Umlauf*, 117 Ill., 585.

If, as decided in said Umlauf case, such a decree against the wife, entered after issue and trial, would not have estopped her from defending on the merits the different issue of wilful desertion in her husband's subsequent divorce suit, it must follow, as estoppels must always be mutual, that a decree in her favor in her separate maintenance suit in any case, and especially if it was entered by stipulation and consent, should not and

cannot bar and estop the husband from bringing, prosecuting and trying upon evidence and upon the merits the complaint for divorce for her wilful desertion, an entirely different issue looking to entirely different relief, not prayed for or competent for the court to grant upon the issues as they stood *in* before they were stipulated *out of* the separate maintenance suit.

As to the additional charges shown (p. 3) to have been made by Mrs. Harding against her husband, by amendments to her bill, it is to be said that they were purely auxiliary and incidental to her only real charge that she was living apart without her fault; and that the defendant's denial of the same and his counter charge that she was living separate without his fault was likewise simply auxiliary and incidental to his defense; and his further allegation that "defendant upon learning of 'such' abandonment and desertion by complainant, immediately sent repeated and urgent invitations to her to return to his house," did not amount to a charge of *wilful* abandonment and desertion, much less a wilful abandonment for two years for which a divorce could be obtained. but only "such" as was just previously characterized and designated, namely her going and remaining away without excuse therefor, wholly of her own fault and without his fault; in other words he simply called by the name of abandonment and desertion what she called a separation without her fault. Such defensive retorts cannot possibly be exalted to the dignity and status of issues to be tried, and cannot plausibly be so tortured as to reasonably lend them that dignity.

Just here we may say that under well settled legal principles and precedents, Mr. Harding, while entitled if he chose to make the wife's wilful desertion after it had continued two years a distinct issue in the maintenance

case by filing an answer and prosecuting a cross-bill distinctly and directly making it such an issue and praying for a divorce on that ground, *he was not obliged to do so;* but might confine his defense wholly to the charge made by his wife, without thereby losing or surrendering his reserved right whenever it suited his convenience to ask for a divorce on the ground of wilful desertion or any other good statutory ground which he may have had, and had the perfect right to reserve and to resort to any of said sufficient grounds and later on procure his divorce therefor on proper and sufficient proofs.

Cromwell v. *Sac County,* 94 U. S., 351-371.
Watts v. *Watts,* 160 Mass., 464.

These principles are enunciated in many decisions, and notably as follows in the two last-mentioned cases:

"Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action other demands arising out of the same transaction."

Cromwell v. *Sac County,* 94 U. S. 351-371.

"It would be a harsh and oppressive rule which would make it necessary for one sued on a trifling claim to resist it and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material

fact alleged and not denied in a declaration so as to preclude him from showing the truth if *another controversy* should arise between the same parties. There might be various reasons why he would prefer to submit to a claim rather than to defend against it."

Watts v. *Watts*, 160 Mass., 464.

We therefore differ radically from counsel's claim that the issue of willful desertion was clearly and sharply presented by the husband's answer to the separate maintenance bill.

We have already commented elsewhere on the finding of the decree "that the equities were with the complainant." (Page 4, counsel's brief.) If the decretal clause that she was living separate and apart from her husband without her fault was put into the decree by stipulation as consent of the parties, as we deem to be unanswerably proved, then, of course, the "equities were with the complainant" to have just what the stipulation provided she should have, namely, separate maintenance; such were her equities as per stipulation and as per stipulated decree.

Nothing, we think, can be made out of the point (page 4) that when the decree was entered Harding objected and excepted to it and to every finding thereof, nor of the further fact that he prosecuted appeals therefrom. His stipulation was not that the wife might take a decree for any amount the master or the court might see fit to fix, but only for such a sum as might be just and equitable.

The master fixed $8,000 per annum; the Circuit Court cut it down to $6,400 per annum; and the Supreme Court cut it down to $3,600. The stipulation manifestly contemplated that there should be no decree at all except

after finding on evidence of an amount that would be reasonable and which was just necessarily a condition to the entering of the decree by consent; otherwise no decree was to be entered at all, and whenever the reasonable and just amount should be adjudged, the decree finding that she was living apart without her own fault was to be entered as a decree by consent, but not before; if so entered when the amount found was unreasonable and unjust, Mr. Harding had, of course, a right to except and appeal from it, the ground of his exceptions and appeal being, of course, that the conditions had not been fulfilled upon which such decree by consent was to be entered.

In no event was it intended by the stipulation that evidence should be heard or adjudication had on the issue that she was living separate and apart without her fault; since that issue was, by the stipulation, put out of the case, not to be *tried*, no evidence to be heard upon it, and all evidence upon such an issue being shut out by the court's adjudication contained in its order of reference. (Trans., p. 79.)

The reference of counsel to the reports of the case of *Harding* v. *Harding* in the Supreme and Appellate courts of Illinois are references to matters outside of the record and transcript, and should not, we submit, have any weight with this court for that and other reasons.

The argument on page 5 of counsel's brief is remarkable for the coolness and calmness with which it ignores the law as elsewhere quoted from *Wahle* v. *Wahle*, 71 Ill., 514, that "a judgment or decree is not evidence upon a question which was only collaterally drawn in question, nor to any matter incidentally cognizable nor where it is to be inferred from the judgment only by argument or

construction." Counsel's said argument further ignores the leading and luminous decision of this court on the same and cognate questions in *Cromwell* v. *Sac County*, wherein the court, Mr. Justice FIELD delivering the opinion, said:

> "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined. Only upon such matters is the judgment conclusive in another action."
>
> *Cromwell* v. *County of Sac*, 94 U. S., 197.

The case of *Burlen* v. *Shannon*, 3 Gray (69 Mass.), 387, wherein the opinion was written by Chief Justice SHAW, is a most interesting case in every point of view upon various questions under discussion. The syllabus is:

> "A decree of this court, dismissing for want of proof a libel, filed by a wife against her husband,

after having left his home, for a divorce from bed and board for extreme cruelty, is not conclusive evidence of her having unjustifiably left his house, in an action by a third person against him for necessaries furnished the wife."

The issues in the two cases were held to be "distinct," notwithstanding "the proof of each may depend, to some extent, more or less, on the same evidence, *but not necessarily so.* The same acts of violence which would prove extreme cruelty in the one case, would prove such misconduct on the part of the husband and danger on the part of the wife, as would render it justifiable for her to quit his home and seek refuge elsewhere."

> "The two are distinct judicial proceedings, and commenced and conducted with a view to different ends, by different means, and the judgment in one does not necessarily afford ground for a decision in the other. A judgment or judicial determination is conclusive, even between the parties, as evidence *only* of what is *directly put in issue and tried,* not of the collateral and incidental facts which are involved in the discussion, but not embraced in the decree. (1 Greenl. Ev., Sec. 528.)"

The fifth point decided (p. 391) is very interesting and applicable in the present case. It is this:

> "It follows, as a necessary conclusion, that, as the former judgment was on another issue, *there is no objection to using the same evidence,* if pertinent to the issue, in another case between the same parties. * * * *It is only when the fact is specially put in issue, traversed and tried,* that a verdict and the judgment following it, are evidence against a party." (Citing cases.) "It is argued that the acts of cruelty charged in the libel ought not to be again offered in this suit, because, these facts being alleged in the former suit, the effect of the judgment was to disprove them. But this cannot be maintained, for the reason above mentioned that the judgment did

> not directly decide upon the truth of the facts particularly relied on in this case."

It should be equally evident in the present case, that the decree in the maintenance suit, even if it had been an adjudication and not a decree by consent, did not *directly* decide anything but the fact in issue, namely, that the wife was living apart without her fault; and as that is not the issue or an issue in this case, whatever probative value that fact might or might not have if admitted, in connection with other facts, upon the different issue in this case of wilful desertion by the wife, would arise as a mere matter of argument, deduction and inference, and so would not be an estoppel nor conclusive or even evidence upon the totally different issue in this case.

Again, Chief Justice SHAW said in another case, *Sawyer* v. *Woodbury*, 7 Gray (73 Mass.), 502:

> "Estoppel is laden with conditions and qualifications which must be strictly observed, without which it would sometimes operate harshly to exclude the truth. It must be an averment of a fact precisely stated on one side and traversed on the other, and found by the jury affirmatively or negatively, in direct terms, and not by way of inference."

Suppose the maintenance decree in this case had contained an explicit finding and judgment order adjudging that either spouse had wilfully, without cause, and without the other's consent deserted the other and continued such wilful desertion for the satutory period, would not that finding and judgment order have been as the pleadings stood, entirely outside of the issue; and if a divorce for wilful desertion had been decreed without any prayer for it on either side, would not that too have been foreign to the issue and totally ineffectual as a bar or for any other purpose?

Smith v. *McCool*, 16 Wall., 563, is a very strong case against estoppel by consent. The agreed case related to the pedigree of the plaintiff's grantor and was put in the form of a special verdict, upon which judgment was finally rendered for the defendant as ordered by the Supreme Court. Nevertheless all this was held by the court no estoppel, not even evidence; the court saying, amongst other things:

> "The rule of the court which required plaintiff to prove the heirship *aliunde* subjected him to no hardship. If the facts were as found by the special verdict, there could be no difficulty in proving them, as they were proved before. If the facts were otherwise, to admit the estoppel would have involved the sacrifice of justice to a technicality and have subjected defendant to a grievous loss, which he ought not to be required to bear. The parties were properly allowed to stand in the second action in all respects upon a footing of equality as they stood in the first."

In view of the indisputable fact that the master, by the order of reference, was prohibited from taking and considering any evidence whatever upon the eliminated issue of the wife's living apart, we do not comprehend the object of the references to testimony before the master found on pages 9 and 10 of counsel's brief.

On page 11 counsel again lapse into the same error and statement concerning the "identical issue."

On page 12 they imply that the use of most of the same evidence in the two cases identifies the issues as the same.

This was not, as we have seen, Chief Justice Shaw's opinion.

What is said on page 12 about the claim of Mrs. Harding's answer as to "admission of record," and "sol-

emnly admitted of record," should be read in connection with the *nunc pro tunc* order of reference (Trans., 15), whereby the words "now admitting in open court" were stricken out and words relating to the stipulation substituted in their place.

On page 13 counsel make the important and significant admission that "the divorce came on to be heard upon the complaint and upon her answer and supplemental answer, and *upon evidence introduced*"—in other words, they admit that the hearing was upon the merits and upon evidence relating thereto.

And upon the same page they undertake to press into service as proof of identical issues the stipulation as to evidence filed in the California court and that evidence itself; claiming, on page 14, that under said stipulation the testimony of thirty-seven witnesses who testified in the Illinois case was read *on the hearing;* and on the same page they distinctly say that the two cases were *"tried largely on the same evidence."*

We claim, on the other hand, that while said stipulation and evidence and trial by no means prove that the issues were the same, they do by all means prove that the estoppel defense pleaded was utterly waived, and the trial became and remained to the end a trial upon the merits, wherein after failing of success, upon which she speculated, the wife sought in the Supreme Court of California to return to her said plea of estoppel, after waiver of the same, when that court also defeated her upon the merits and upon the weight of the evidence.

As held by the Supreme Court of California in this case, quoting *Megerle* v. *Ashe*, 33 Cal., 74, 84:

> "A party cannot rely upon a judicial determination of the issue by way of estoppel and also upon

proof of the facts upon which the determination is based. The necessary effect of the estoppel is to preclude all inquiry as to the truth of the matter determined, and when a party who is entitled to set up the estoppel does open the inquiry into the truth of the matter, he cannot complain if the other party pursues it without regard to the estoppel."

In another case the Supreme Court of New York held as follows:

"We do not think that the point that the matters involved in this suit are *res judicata* is well taken * * * The whole trial proceeded notwithstanding the allegations in the complaint that there had been a previous adjudication * * * upon the theory that the question was still open * * * and the case having been submitted * * * upon all the evidence, we think that the plaintiff is estopped from taking the position that the defence could not litigate that question in this action." *Howe* v. *Lockwood*, 17 N. Y. Supp., 817-9. See also *Pearce* v. *Frantum*, 16 La., 414; Black on Judgments, last Ed., on waiver of estoppel and ref's.

Here the plaintiff in error went voluntarily not only into the stipulation but into the introduction of evidence thereunder and trial of all the issues under said evidence.

Issues not identical under special features of California code. Illustrative cases.

Further, we maintain that there was no identity of the question raised under the Illinois statute in the Illinois court—even if that question had been litigated and judicially determined—with the question raised by the pleadings in divorce case. The rule is that:

> "In order that a judgment in one action may constitute an estoppel upon the parties thereto in a subsequent action it must be made to appear either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action * * * 'Every estoppel must be certain to every intent, and not to be taken by argument or inference.' (Coke on Littleton, 352b.) 'If, upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.' (*Russell* v. *Place*, 94 U. S., 606.)"
>
> *Beronio* v. *Ventura Co. Lumber Co.*, 129 Cal., 236.

The issue for decision in the present case arises under the statute of California defining the offense of desertion in matrimonial law. By Sec. 92 of the Civil Code one of the grounds for which a divorce may be granted is "willful desertion." Willful desertion is defined in Sec. 95 to be "the voluntary separation of one of the married parties from the other with intent to desert." Sec. 100 provides that "Absence or separation proper in itself becomes desertion whenever the intent to desert is fixed during such absence or separation." Sec. 102 declares that if one party deserts the other and before the

expiration of the statutory period required to make the desertion a cause of divorce, returns, etc., and solicits condonation, the desertion is cured. If the other party refuses, such refusal is desertion. The perusal of these sections of our statute will suggest sundry questions which may arise in an action of the character before the court here, and which could not arise under the statute of Illinois. The statute of Illinois defines a state of circumstances under which the wife may obtain separate maintenance. The statute of California defines other and different circumstances under which the husband (for example) may obtain relief from the bonds of matrimony. Thus, to illustrate: Suppose Mrs. Harding were living in the State of Illinois separate and apart from her husband without her fault; she would be entitled to a decree against her husband for maintenance under the statute of that state. But it is provided by the California Civil Code that such separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such separation. (C. C., 100.) If, therefore, Mrs. Harding, although living separate from her husband without her fault, formed the fixed intent to desert during such separation, then in virtue of C. C., Sec. 100, her separation became desertion. And desertion arising in that way, if continued for one year, gave to her husband, by the law of this state, a ground for divorce. (C. C., Sec. 107.) It is therefore apparent that under the law of Illinois a woman might be living separate and apart from her husband without her fault, enjoying a maintenance decreed to her by the Illinois court, and yet by the law of this state, if she formed a fixed intent to desert, afford to her husband domiciled in this state a cause of action for divorce on the ground of desertion.

So, take the events of this case: The wife separated herself from her husband on or about February 1, 1890. The Illinois court—by virtue of a stipulation of the parties—held that such separation was without her fault. But a few days later she entered his house with her children by his invitation and he urged her to return (Trans., 39-41), and again, to wit, on February 5, 1890, Mr. Harding addressed to his wife a letter in affectionate terms, asking her to return, saying "if there are any obstacles to your return home at once I am willing to do what I can to remove the same," etc. (Trans., 41.) And in his answer in the suit for maintenance the husband again urged his desire and request that his wife return to his home "and take and retain her place there as his wife," promising to do all in his power "to fill the remaining days of her life with happiness and peace." (Trans., p. 43; March 19, 1890.) Now, by the law of California, upon these offers made by the husband, even if he had previously been in fault, it was the duty of his wife—assuming that his offer was made in good faith, which the findings and judgment of the court below impliedly assume—to return; and her refusal to do so was desertion. His offer and her refusal are facts tending to prove her desertion. (*Howard* v. *Howard*, 134 Cal., 346; *McMullin* v. *McMullin*, 123 Cal., 653; Civil Code, Sec. 102.) So that, although in Illinois Mrs. Harding might have separated herself from her husband and lived separate from him without her fault, yet after his offer of reconciliation and her refusal of the same, she was, under the statute of, and the decisions in California, guilty of desertion.

The impossibility of finding identity in the question to

be tried under the Illinois statute relied upon by Mrs. Harding and the question for trial under the charge of desertion made by the plaintiff in his complaint under the law of California, results from the intrinsic differences in the legislation involved in the two suits respectively. We submit it to be clear that an action for divorce under the provisions of the California Civil Code relative to the matrimonial offense of desertion cannot be cast into the same mold with an action for separate maintenance under the Illinois statute set out at folios 16-17 of the transcript, and therefore there is no identity of questions involved, within the meaning of the rules epitomized in *Beronio* v. *Lumber Co.*, 129 Cal., 236.

That to constitute estoppel by matter of record there must be entire identity of the issue decided and the issue to which the estoppel is sought to be applied, and for additional illustration of the rule, see *Freeman* v. *Barnum*, 131 Cal., 386; *McDonald* v. *B. R., etc., M. Co.*, 15 Cal., 145; *Williams* v. *Williams*, 63 Wisc., 58; *Aspen* v. *Parker*, 2 Burr., 666.

FURTHER THE ESTOPPEL FAILS BECAUSE THE FINDING IN THE PRESENT CASE DOES NOT RELATE TO THE SAME TIME AS THE FINDING IN THE FORMER CASE, AND HENCE THE ESTOPPEL LACKS THE IDENTITY REQUIRED.

The finding in the Illinois case considered as an estoppel must be within the issue in that case. The issue in the Illinois bill and again as alleged in the answer in the case at bar is only this, viz.: that the wife left her husband on February 1, 1890, and was when the Illinois bill was filed on February 3, 1890, living separate from her husband without fault.

(In *King* v. *Chase*, 15 N. H., 16), cited favorably more

than once in this court, the sound doctrine is thus laid down: "A fact or matter in issue is that upon which the plaintiff proceeds by his action and the defendant controverts by his pleadings," and out of said pleading upon such issue only can an estoppel in a former case upon a different legal matter stand.

That she was living separate and apart without fault after February 3, 1890, was not in issue, nor can it, as the authorities presently cited will clearly show, be collected or inferred from the sentence; from the grant, for example, of alimony for a subsequent period or any other finding in the decree that such separation without fault existed or continued at a later date than the separation alleged in the bill, and the only separation in issue.

The wife could not have been defeated in the former case by proof of her desertion at any time after bill filed.

The complaint in the case at bar alleges desertion "on or about February, 1890" (*Id.*, 2); the finding of the court finds desertion "on or about the first day of February, 1890." (*Id.*, 46.) Desertion on February 3, 1890, after this bill in Illinois was filed, or at any day later in February, would be sufficiently described by the time fixed for the desertion in complaint and finding.

THE DATE OF THE DESERTION MAY HAVE BEEN ANY TIME ON OR ABOUT FEBRUARY, '90, AND ON OR AFTER FEBRUARY 3, '90, WHEN THE ILLINOIS BILL WAS FILED.

The chancellor had good ground for his finding and decree; for in the present case the evidence shows that on or about February, 1890, just *after the former bill was filed, the wife came again by her husband's invitation into his house* (Test. Resp., *Id.*, 93) and being urged by him to stay replied: "I have made mistakes enough" and again left his house. On February 5th, he again

wrote to her a letter in evidence (*Id.*, 95, Test. Resp.) urging her to return to her home to which she made no reply. In his answer of (*Id.*, 160) March 19, '90, in Illinois case, the husband writes and requests her return home and alleges that he has sent repeated and urgent invitations to her to return. Upon either of these three pieces of evidence the chancellor may well have decreed that on or about February 1, 1890, she deserted her husband and that her subsequent living separate and apart without fault up to filing her bill on February 3, 1890, in the former case may well stand with the finding in the present case that she deserted her husband and lived separate and apart from him without just cause after the Illinois bill was filed.

No subsequent desertion was set up in the answer in the former case; the language of the answer relating to her conduct relates, and must be properly construed to relate, to the time of filing the former bill; but this is not important because the chancellor in the Illinois case certainly did not hear evidence and did not upon consideration of such evidence determine whether she had deserted her husband after bill filed.

It is certainly sound law that "every estoppel because it concludeth a man to allege the truth must be certain to every intent and not to be taken by argument or inference;" and where the door is opened by the party pleading the estoppel and the truth introduced, a court of justice will be especially slow to turn it out.

(Coke upon Littleton, L. 3, C. 12, Sec. 567.)

"Certainty is essential to all estoppels." (Bigelow on Estoppel, 5th Ed., 578.)

The question turns upon whether the decree and find*ing* in the case at bar was "Necessarily at variance with

the judgment ON THE PLEADINGS" in the former case; "and otherwise there is no estoppel."

(Bigelow on Estoppel, p. 77.
Brown v. *Mayer*, 66 N. Y., 385.
Blair v. *Bartlett*, 75 N. Y., 150.
Nemetty v. *Moylin*, 100 N. Y., 562.
Orr v. *Mercer County Ind. Co.*, 114 Pa., 367.)

"It is true that such matter" (flow of water) "was necessarily involved and must have been determined before judgment could have been entered in former suit; but it does not appear from the record that such question was raised and litigated."

Freeman v. *Barnum*, 131 Cal., 386.

Findings *outside the issues* have no effect as to estoppel.

Lillis v. *Erie Ditch Co.*, 95 Cal., 858.
Russell v. *Place*, 94 U. S., 606.

"It must be a fact *in issue* as distinct from a fact in controversy, * * * found *according to the pleadings.*" (*Id.*, 559.) "Only upon issues *upon which judgment depends* are parties estopped."

1 Greenleaf's Evidence, Sec. 528.
McDonald v. *Black Co.*, 15 Cal., 145.

The estoppel here would rest upon mere inference that said matter was determined from the allowance of alimony after February 3, 1890, and hence was tried and heard and properly decided; but "before that can be done, the law not favoring estoppel, the truth is not shut out except that it shall appear with certainty that such matter has been so determined, and also that it was within the issue shown by the pleadings."

People v. *Frank*, 28 Cal., 507.

The question must have been *submitted on its merits.*

Greenleaf on Evidence, Sec. 530.

Gray v. *Dougherty*, 25 Cal., 272.

In *Aspen* v. *Parker*, 2 Burr., 666, Lord MANSFIELD delivered the opinion as to effect of a former judgment in ejectment in later action for mesne profits, and he laid down the principle:

> "That this judgment, like all others, only concludes the parties as to the subject-matter of it. *Therefore, beyond the time laid in the demise, it proves nothing at all; because beyond that time plaintiff has alleged no title,* nor *was he bound to prove any.*"

In *Bozquit* v. *Crane*, 51 Cal., 505, action for damages for trespass to land, the plaintiff relied upon certificate of purchase from the state and the defendant put in issue plaintiff's title. Although plaintiff recovered judgment, it is not a bar to a later action by defendant against plaintiff to determine which had better right to buy from the state.

In *Sawyer* v. *Boyle*, 21 Texas, 28, a decree of distribution of an estate, it was held, necessarily involves the fact that all distributees are living, but this only incidentally as the basis of the decree; but the decree is not conclusive, for one or more distributees may be shown to be dead at the date of the decree, and it makes no difference that the former decree recites their presence. (*Id.*, 27 Texas, 448; 2 Freeman, Sec. 612.)

So, where the first suit by wife is for necessaries and the second is for her board; the first suit did not show whether the husband and wife were cohabiting at the time; it was held that since the *fact was not directly in issue in that suit and could only be inferred by argument*

from the judgment, the record could not be used in second suit to show the husband had driven away wife.

Lentz v. *Williams*, 17 Pa., 412.

In *Lewis* v. *Nelson Appeal*, 67 Pa., 153, it was held that the estoppel of a judgment extends *only to the question directly involved in the issue*, and not to any incidental or collateral matter, though it may have been passed on.

That was the case of an application to sell land, and the amount due from the personal representative to the estate became matter in controversy affecting the amount of the assets primarily chargeable, yet this *was not matter in issue, though in controversy;* and the decree was held not to be conclusive on the final settlement of the executor's account.

In *Ford* v. *Ford's Adm.*, 68 Ala., 41, where suit was had upon an agreement to buy realty and jury found for defendant, it was held that the delivery of the deed *was not in issue within the meaning of the rule, though passed upon*, so as to require the court in an action of covenant to take from the jury the question of delivery of the deed.

Car v. *Buehler*, 120 Pa., 341.

In *Williams* v. *Williams*, 63 Wisc., 58, where the former action was for divorce, alleging the wife *duly and legally married at a time and place named* and *setting up desertion as a ground for divorce;* and the defendant did not answer, so that a *decree was taken by the wife.* Meantime, she contracted marriage with a second husband and after his death brought suit for dower in his lands, and it was resisted on the ground that she was not his wife and her divorce decree from the first

husband was put in evidence. The court held that *she was not estopped to show by other evidence that she never was legally married to the alleged first husband,* because he had a wife living, and so had no capacity to contract marriage; and this on the ground that the decree of divorce *did not actually pass upon the validity of the marriage; because this validity so far as it entered into the decree* in the former case was a matter ONLY INCIDENTALLY COGNIZABLE OR INFERRED BY ARGUMENT FROM THE JUDGMENT."

(In *People* v. *Johnson*, 38 N. Y., 63.) It was held that *although a decree in express terms professes to affirm a particular fact,* yet as such fact was *immaterial to the issue and the controversy did not turn upon it,* the decree will not conclude parties in reference to such fact.

In Smith's Leading Cases, Vol. 2, p. 2013, 10th Ed., it is laid down with authorities cited in support of it: "If a thing is *not directly and precisely alleged it shall be no estoppel,* for an estoppel *not being* favored by law must be certain to every intent."

"If the *language of a decree is general it may be restrained to the issues made in the case* and to the subject matter under consideration by the court."

McDonald v. *Black Co.*, 15 Cal., 145.

In view of the opening by the stipulation and evidence thereunder of the whole inquiry into the truth of the matter alleged, namely, willful desertion, and the decision of that issue and all others adversely to plaintiff in error, we urge with confidence that the decision of this case did not and does not necessarily turn upon any federal questions; that this court, therefore, has no jurisdiction of this cause, and that the writ of error should be dismissed

for such want of jurisdiction, which dismissal we respectfully ask.

We cheerfully concur in the admission of opposing counsel (p. 22), sustained by so many of their citations, that it must appear that the decision of the federal question upon which the case is brought to this court must have been necessarily involved in the state court and that the case could not have been determined without deciding such question.

Authorities to that effect might be indefinitely multiplied, but for our purposes we need add only one more case, *Murdock* v. *Memphis*, 20 Wall., 590, where Mr. Justice MILLER, delivering the opinion of this court, laid down certain cardinal essentials to the jurisdiction of this court over the judgment of a state court, among which were:

> "1. That it should appear by the record that one of the questions mentioned in the Federal Judiciary Act *must have been raised and presented in the state court.*
>
> "2. That it must have been *decided,* or *that its decision was necessary,* to the judgment or decree rendered in the case.
>
> "3. That the decision must have been against the right claimed or asserted by plaintiff in error under the constitution, treaties, laws or authority of the United States.
>
> "4. If found rightly decided, the judgment must be affirmed.
>
> "5. If erroneously decided, *but any other issue is adjudged by the state court sufficient to maintain the judgment, it must be affirmed without inquiring into the soundness of the decision of such other issue.*"

As to all questions of fact, including questions of desertion, domicile, good faith, etc., we submit that not only are those questions properly held by the California Supreme Court to have been conclusively settled by the

decree of the trial court in San Diego County (Transc., 108) but they are by this court held conclusively settled by the decision of the state courts.

McKinney's 4 Fed. Stat. Ann. (1904), p. 490.

As to the question suggested by counsel (Trans., 38) "whether jurisdiction to render a divorce having extra territorial effect could be acquired by a mere domicile in the state of the party plaintiff where there had been no matrimonial domicile in such state," we leave counsel for the present to wrestle with it alone until such time as they can produce a controlling authority upon the question. They substantially admit that they have found none and that in two cases which came to this court, the question was "expressly reserved."

We do not see, however, that the question of the extra territorial affect of this divorce decree, outside of California, now properly arises. The divorce decree was entered in California; and it would seem that upon this record, no question is involved save its effect as a valid decree of divorce in the State of California and not its effect in any foreign state. It will be time enough to decide that question when it properly arises and demands decision.

As to the assertion of counsel (p. 26) that "the California court was bound by the Illinois decree *yet proceeded to adjudicate the identical issue upon, in great part, the same identical evidence,*" etc.,—it should be borne in mind that the court did not force the plaintiff in error to put in or agree that either party might put in the whole or any part of the so-called identical evidence; but that the plaintiff in error and her counsel, by entering into the stipulations at the California trial and putting in old and new evidence upon the issues there pending

and tried, *absolutely waived* their pleas of bar and estoppel.

On page 29, counsel virtually claim that the decree and its recitals as to hearing upon bill, answer, replication and proofs, preclude all right to prove that the decree together with those very recitals was in truth and reality a decree by consent.

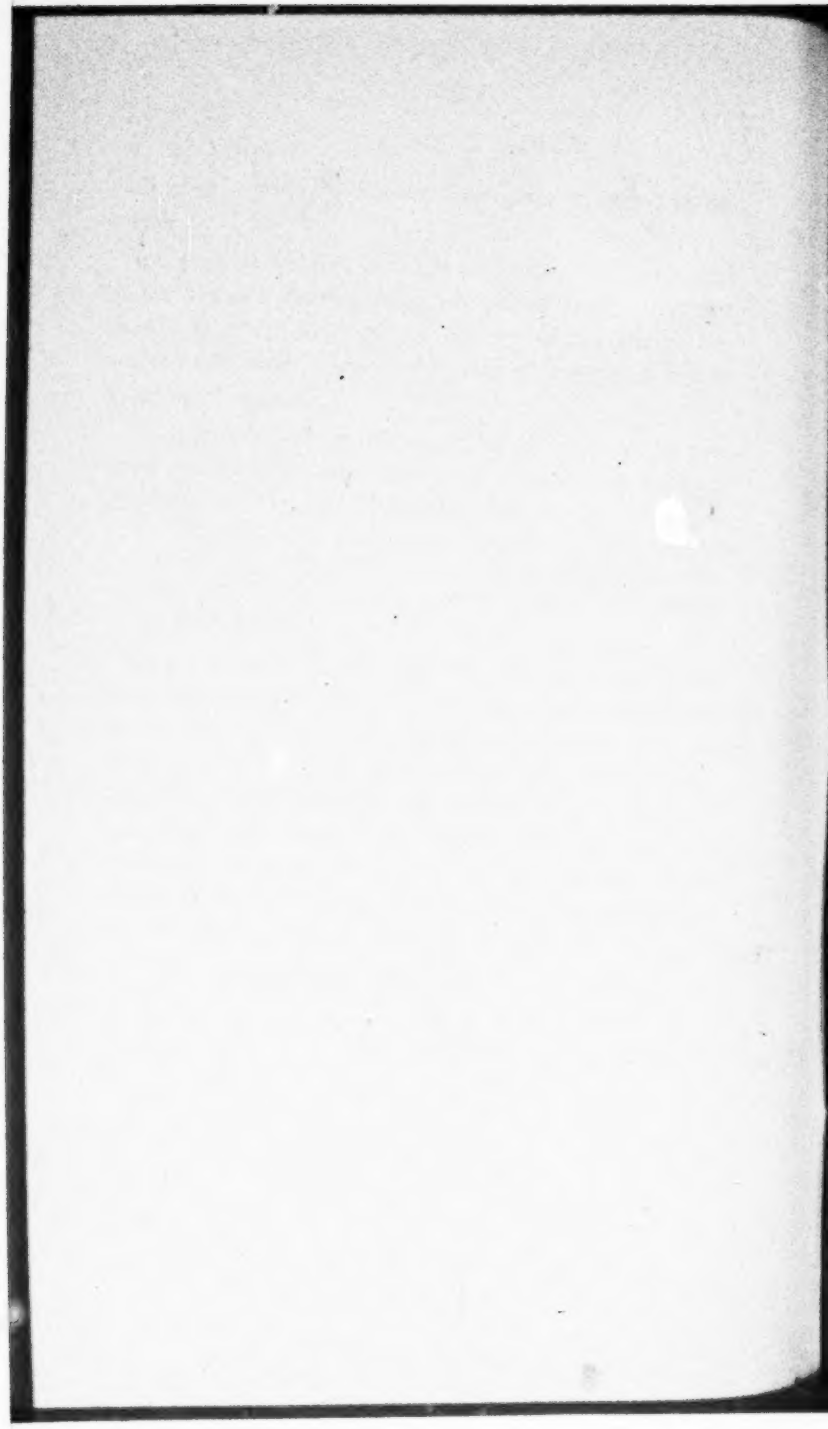
A quite sufficient answer to all this is that given by this court in *Gay* v. *Parpart*, 106 U. S., 679-699 (approving *Wadhams* v. *Gay*., 73 Ill., 415), *viz:*

> "Equity will penetrate beyond the covering of form and look at the substance of the transaction, and treat it as it really and in essence is, however it may seem."

With reference to the supposed misconception by the California Supreme Court of the Illinois Supreme Court's decisions in the last mentioned case and another case, we fail to see the force of the criticism. To our apprehension, while it is true that other points of law dwelt on by counsel were involved and decided, still the cases did lay down and decide the law of *res judicata*, and as to consent decrees and estoppel correctly and in conformity with the best authorities on those subjects.

Respectfully submitted.

WM. H. BARNUM,
Attorney for Defendant in Error.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 222.

ADELAIDE M. HARDING, PLAINTIFF IN ERROR,

v.

GEORGE F. HARDING.

ADDITIONAL AUTHORITIES FOR THE DEFENDANT IN ERROR.

On Waiver of Estoppel.

92 Penn., 499, Seymour *v.* Hubert.
60 Fed. Rep'r, 751, Mack *v.* Levy.
13 How. (U. S.), 335, Phila. R. R. *v.* Howard.
151 N. Y., 264, Brady *v.* Nally.

On Consent Decrees.

Kelly *v.* Milan, 21 Federal Rep'r, 863.

WM. H. BARNUM,
Counsel for Defendant in Error.